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IN THE

Supreme Court of The United States

OCTOBER TERM, 1964

No. 310

C. GORDON ANDERSON, as TRUSTEE for TMT TRAILER FERRY, INC., FLORIDA TOWING CORP., WAYLAND T. COPPEDGE and SON CORP., MILLER ELECTRIC COMPANY OF FLORIDA, WHITE STACK TOWING CORPORATION, and ST. JOHNS BAR PILOTS ASSOCIATION,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit rendered June 8, 1964 in its case number 20400 styled "UNITED STATES OF AMERICA, Appellant, versus C. GORDON ANDERSON, TRUSTEE, Appellee." This opinion has not been reported and is set forth on page 1a of the Appendix to this petition.* (R. 1108)

*Source references are herein indicated by the following abbreviations:
Appendix to this petition — "App. ____".
Certified transcript of the record below — "R. ____".

The opinion of the District Court for the Southern District of Florida was entered September 28, 1962, entitled "Order Denying Priority Status to Certain Government Claims. . . ." (R. 821-830) and is set forth on page A 16 of the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals is dated and was entered June 8, 1964. (R. 1108) No petition for rehearing was filed. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1) and 11 U.S.C. Section 47c (Bankruptcy Act, Sec. 24c).

QUESTIONS PRESENTED FOR REVIEW

1. Are unsecured claims of the United States of America, other than for taxes or customs duties, entitled to absolute priority in corporate reorganization proceedings under Chapter X of the Bankruptcy Act?

2. Is the priority status of claims in corporate reorganization proceedings under Chapter X of the Bankruptcy Act determined as of the date when such proceedings began or as of the date when a trustee is appointed?

3. Is the United States of America entitled to absolute priority in corporate reorganization proceedings under Chapter X of the Bankruptcy Act with respect to:

(a) A claim based upon a debt due the Prudential Insurance Company when the reorganization proceedings began and secured by a preferred ship mortgage which was insured by the United States under the Merchant

Marine Act, which claim was assigned to the United States four months after the proceedings began.

(b) A claim based upon a debt due the Reconstruction Finance Corporation when the reorganization proceedings began, which was transferred to the Small Business Administration shortly after the proceedings began.

STATUTES INVOLVED

The statutes involved with respect to Question No. 1 are:

1. Section 3466 of the Revised Statutes, being 31 U.S.C. Sec. 191:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

2. Section 199 of the Bankruptcy Act, 1898, as amended by the Chandler Act, 1938, 52 Stat. 840, 893, being 11 U.S.C. Sec. 599:

If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided*, That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed.

The statutes involved with respect to Question No. 2 are the following sections of the Bankruptcy Act:

1. Sec. 1(13) "Date of bankruptcy," "time of bankruptcy," "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

2. Sec. 200.

Where not inconsistent with the provisions of

this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, before the approval of the petition, as in a bankruptcy proceeding before adjudication and, upon the approval of the petition, as in a bankruptcy proceeding upon adjudication.

3. Sec. 201.

All claims arising after the filing of a petition under this chapter and before the qualification of a receiver or trustee or before the petition is approved and the debtor continued in possession, whichever first occurs, shall be provable.

The statute involved with respect to Question No. 3b is the following portion of the RFC Act in 15 U.S.C. Sec. 603(a):

. . . Debts due the Corporation, whether heretofore or hereafter arising, shall not be entitled to the priority available to the United States pursuant to section 191 of Title 31 except . . .

STATEMENT OF THE CASE AND MATERIAL FACTS

This is a proceeding under Chapter X of the Bankruptcy Act, 11 U.S.C.A. Sections 501-676,* for the reorganization of TMT Trailer Ferry, Inc., a maritime freight carrier operating between Jacksonville and Miami, Florida, and San Juan, Puerto Rico. Basis for federal

*References hereafter will be to sections of the Bankruptcy Act, rather than to section numbers used in the United States Code.

court jurisdiction exists by virtue of the Bankruptcy Act and particularly Sec. 111 thereof (11 U.S.C. Sec. 511).

The petitioner, C. GORDON ANDERSON, is the reorganization trustee appointed by the District Court under Sec. 156 of the Bankruptcy Act. The petitioners, FLORIDA TOWING CORP., WAYLAND T. COPPEDGE and SON CORP., MILLER ELECTRIC COMPANY OF FLORIDA, WHITE STACK TOWING CORPORATION, and ST. JOHNS BAR PILOTS ASSOCIATION, are creditors of the debtor holding claims in the aggregate face amount of $180,000 and who have participated in the proceedings in the lower courts.

The District Court on February 14, 1963, confirmed what was called the Internal Plan of Reorganization of the debtor. (R. 881-887) This plan provided for:

a. Payment in full of tax claims of the United States, totaling approximately $192,000, as required by Sec. 199 of the Bankruptcy Act.

b. Payment in full of state and local tax claims totaling approximately $83,000.

c. Settlement of the two largest lien claims which together totaled approximately $904,000.

d. Payment of other maritime lien claims in cash over a period of time. These totaled approximately $120,000.

e. Satisfaction of the claims of all unsecured creditors by issuance to them of all the initial new capital

stock in the reorganized company, pro-rata according to the amounts of their claims, thereby giving ownership and control of the reorganized debtor to such creditors.

f. Exclusion of stockholders from participation in the reorganization because the court had found the debtor insolvent by its OPINION AND ORDER ON VALUATION AND INSOLVENCY entered July 11, 1962. (R. 387.1 - 387.4)

The total of all claims against the debtor was $5,477,000. (R. 288) The District Court in the insolvency order found the going concern value of the debtor to be $2,780,000 (R. 387.5) and the actual or fair value of its assets to be less than $2,000,000. (R. 387.2)

The unsecured non-tax claims of the United States which are the subject of this review, are treated in the plan as being on a parity with the unsecured claims of other general creditors of the debtor. These non-tax claims total approximately $904,000 and the government contends that they have absolute priority, the same as tax claims.

When the plan of reorganization was approved by the District Court for submission to the creditors for acceptance or rejection as required by Sec. 175 of the Bankruptcy Act, the plan provided that the government receive in cash 40% of these claims which are referred to as its non-tax claims. (R. 384) This was a proposed compromise of the claims, the government not having formally expressed its position at the time. It amounted to slightly more than what the plan provided for other unsecured creditors who were to receive common stock worth about

37 per cent of their respective claims based upon the expected value of the stock. (R. 900-901)

The other creditors accepted the plan by more than the requisite two-thirds majority. (R. 387.7-389) The United States objected to the plan and rejected it because it did not provide "for complete satisfaction" of the non-tax claims, (R. 759-760, 761-762) and at the same time offered to settle such claims for $635,000 if paid in cash. (R. 760-761) This offer amounted to about 70% of the claims and was not accepted.

Since efforts to settle with the government had failed, proceedings were held to determine the priority of the government non-tax claims and the District Court entered its order of September 28, 1962, denying priority to such claims and holding that they are of equal dignity with those of other general unsecured creditors. (App. A 16) (R. 821-830)

Thereafter, the plan was amended by court order (R. 869-871) to provide for treatment of the non-tax claims the same as general creditors, and as so amended was confirmed by the court on February 14, 1963. (R. 881-887) Since the government had rejected the plan, the confirmation order contemplated that upon consummation of the plan the non-tax claims would be appraised and paid their cash value, pursuant to Sec. 216(7)(c) of the Bankruptcy Act. This would give the government about 37% of these claims, the same percentage as other general creditors.

Facts With Respect To The Non-Tax Claims

There are six such claims and they are outlined in the footnote on page 2 of the opinion of the Fifth Circuit Court of Appeals. (App. A 2) All of them arise out of business transactions conducted by the government with the debtor; their general nature is similar to that of hundreds of other claims filed by people who did business with the debtor and were not paid.

The two largest claims, those of the Maritime Administration and the Small Business Administration, give rise to the second and third questions presented for review. Petitioners contend that, regardless of the general priority question, these two claims were not entitled to priority on the date (June 27, 1957) when the reorganization proceedings began and therefore cannot acquire priority by virtue of assignments of them occuring after that date.

The Maritime Administration claim in amount of $696,494.19 is a deficiency decree against a vessel of the debtor, the TMT Carib Queen. (See Proof of Claim — R. 1010) The Prudential Insurance Company of America loaned the debtor $2,112,500 in December, 1956, secured by a First Preferred Ship Mortgage on the Carib Queen which was insured by the United States under the Merchant Marine Act. (46 U.S.C. 1271 et seq.)

It appears from the record (R. 1029) that at the time the petition herein was filed (June 27, 1957) the Carib Queen indebtedness was not owing to the United States or to any agency thereof. At that time it was still owing to Prudential. The evidence of indebtedness and the mortgage were not assigned to the United States until October

30, 1957, and the assignment was not accepted by the United States until October 31, 1957. (R. 1022.) Thereafter, on November 15, 1957, foreclosure proceedings were instituted, the mortgaged vessel sold, and a deficiency decree in the amount of $696,494.19 was entered on March 25, 1958 (R. 1023). The claim herein involved is for the amount of this deficiency.

The Small Business Administration Claim is based upon a $200,000 note given to the Reconstruction Finance Corporation by the debtor as part of the purchase price for property sold by RFC, which indebtedness had been guaranteed by the debtor. This indebtedness was still owing to RFC on June 27, 1957, the date the petition herein was filed. It was transferred to Small Business Administration "as transferee agency" of RFC on June 30, 1957 (R. 1016).

It appears from Section 2(c) of the plan for transferring RFC functions to the SBA (71 Stat. 647, 22 F.R. 4633, 15 U.S.C.A. 115) that the only RFC functions transferred to Small Business Administration were those

> "With respect to or arising out of programs of financial assistance to business enterprises and to victims of floods and other disasters."

Under the RFC Act (15 U.S.C. Chap. 14), debts arising out of its normal lending activities, such as those described in and transferred by the above quoted language, were expressly denied the priority given to the United States by R.S. 3466. The exact language of that Act with respect to such priority reads as follows:

"Debts due the corporation, whether heretofore or hereafter arising, shall not be entitled to the priority available to the United States pursuant to Section 191 of Title 31 (R.S. 3466) except . . . . " 15 U.S.C. Sec. 603(a).

The government contends that for the purpose of establishing the priorities of these two claims the reorganization proceedings did not commence until the date (November 18, 1957) when trustees were appointed. The sequence of events is as follows:

June 27, 1957. This proceeding was instituted by three creditors who filed an involuntary petition under Sec. 126 for appointment of a trustee vested with the powers of a receiver for reorganization of TMT under the provisions of Chapter X. (R. 395-401).

June 30, 1957. Small Business Administration became the "transferee agency" of the RFC, with respect to the RFC loan to the debtor.

July 12, 1957. TMT filed a motion for a stay of actions against it pending approval or dismissal of the petition (R. 404-405). The petitioners having joined in said motion in open court, a stay order was immediately entered. (R. 405-407).

Oct. 30, 1957. Prudential mortgage on the Carib Queen assigned to the United States and accepted by it the next day. (R. 1022)

Nov. 18, 1957. Petition for reorganization approved and trustees appointed. (R. 433-439).

The facts and pleadings outlined above are the material ones supporting petitioners' contentions that the Maritime Administration and Small Business Administration claims are not entitled to priority because they enjoyed no such preference when the proceedings began on June 27, 1957.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE HOLDING BY THE COURT OF APPEALS THAT GOVERNMENT NON-TAX CLAIMS ARE ENTITLED TO ABSOLUTE PRIORITY IN CHAPTER X PROCEEDINGS IS CONTRARY TO THE INTENT OF CONGRESS AS EXPRESSED IN THE BANKRUPTCY ACT AND IS CONTRARY TO THE DECISIONS OF THIS COURT IN CONSTRUING SAID ACT AND IS CONTRARY TO DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

The decision below means that the non-tax claims have absolute priority, the same as tax claims, and that unless the Secretary of the Treasury consents to accept a lesser amount, they must be paid in full, otherwise there can be no reorganization. This holding is based not on any express provision found in Chapter X but on the proposition that under Chapter X the rule governing priorities is that which prevails in equity receiverships. The holding, however, does not permit the consideration

of equities but allows an absolute compulsory priority, absent a waiver thereof by the Secretary of the Treasury.

a. Chapter X Does Not Provide Any Priority For Government Non-Tax Claims.

Any priority allowed to claims of the United States must be based upon some express statutory authority and does not stand upon any sovereign prerogative. *United States v. State Bank of North Carolina*, 31 U.S. 29, 35, 8 L. Ed. 308, 310 (1932).

The only priority provision in Chapter X with respect to claims of the United States is found in Sec. 199. This section covers the entire field of claims by the government, secured and unsecured, tax or non-tax. The only priority granted is to "claims for taxes or customs duties". Under the well recognized principle of "*Expressio Unius Est Exclusio Alterius*" the specific grant of absolute priority to tax and customs claims only shows the clear intent of Congress to deny such priority treatment to non-tax claims.

b. The Provisions Of The Bankruptcy Act and That Act Alone Govern All Matters of Priorities With Respect To Government Claims.

The decision below applied to Chapter X proceedings the priorities of Section 3466 of the Revised Statutes (31 U.S.C. Sec. 191) which was enacted in 1797 prior to any federal bankruptcy law.

Acts on the subject of bankruptcy were enacted in 1800 (2 Stat. 19), which Act was repealed in 1803; in

1841 (5 Stat. 614), which Act was repealed in 1843; and in 1867 (R.S. 5101), which Act was repealed in 1878. Congress recognized in each of these acts that in bankruptcy proceedings no priority for unsecured claims exists, under R.S. 3466 or otherwise, unless specifically provided, because in each of these Acts Congress did specifically and expressly provide priority for all claims of the United States, tax and non-tax, thus in substance re-enacting and incorporating into the Act the provisions of R.S. 3466. Such a specific provision would have been quite unnecessary if R.S. 3466 automatically applied in bankruptcy proceedings.

While these Acts were in effect there was therefore no question but that non-tax claims of the United States had priority in bankruptcy proceedings. From the time the 1867 Act was repealed in 1878 until the present Bankruptcy Act was enacted in 1898, we had no Federal bankruptcy laws.

The Bankruptcy Act of 1898, as originally enacted, however, omitted the priority specifically given to "all debts due to the United States." By Sec. 64 it gave priority only to "all taxes legally due to the United States." In subsequent litigation under the 1898 Act it was contended by the Department of Justice that the United States was entitled to priority on its non-tax claims under the priority provision for debts owing to any "person" who by the laws of the United States is entitled to priority. It was contended that the United States was a "person" and that R.S. 3466 gave priority to all debts due the United States.

This presented squarely the question of whether R.S.

3466 was applicable to bankruptcy proceedings in the absence of any provision to that effect in the Bankruptcy Act. The question was answered in the negative by this Court in *Davis v. Pringle*, 268 U.S. 315 69 L.Ed. 974 (1924).

The Fourth Circuit Court of Appeals had disposed of the government's contention in the Pringle case by holding that the Act of 1898 was intended to cover completely all matters of priorities, that Congress had taken from debts due the United States, other than taxes, the priority given such debts along with taxes by the Act of 1867 by leaving out of the Act of 1898 other debts in providing for priority of taxes, and that in bankruptcy proceedings the Act of 1898 *superseded section 3466, R.S.*, so far as the two statutes were inconsistent. *Davis v. Pringle*, 1 F.2d 860 (4th Cir. 1924).

This court affirmed the Fourth Circuit in *Davis v. Pringle*, 268 U.S. 315, 69 L.Ed. 974 (1924) and held that any such priority must be found within the Bankruptcy Act, that Congress had clearly intended a change of the priority given the government in prior acts, and that Sec. 3466 R.S. was not applicable.

The decision of the lower court clearly disregards the principles laid down in the Pringle cases. It is also contrary to the holding in *U.S. v. Sampsell*, 153 Fed. 731 (9th Cir. 1946) that R.S. 3466 was superseded by the Bankruptcy Act and that priority to claims of the United States is based entirely on provisions within the Bankruptcy Act. To the same effect also is the case of *In Re. Taylorcraft Aviation Corporation*, 168 F.2d 808 (6th Cir. 1948).

c. Congress did not intend that priorities formerly applicable in equitable receiverships with respect to claims of the United States were to be applicable in Chapter X proceedings.

When Congress amended the Bankruptcy Act of 1898 in 1926 (44 Stat. at L. 662, Chap. 406) the present language was inserted in Section 64 (a) (5) of the Bankruptcy Act which expressly provides priority for *all* debts owing to the United States, thus changing by statute the effect of the ruling in the Pringle cases insofar as debts other than taxes are concerned.

But here we are not in conventional bankruptcy and must look to the provisions of Chapter X. By Section 102 of Chapter X, Section 64 is expressly made inapplicable to Chapter X proceedings. The lower court recognizes this but goes off on a tangent by comparing Chapter X proceedings to equity receiverships where, it is assumed, R.S. 3466 is applicable so as to give the government an absolute priority for all debts due it. No cases whatever are cited for this proposition, and the court below completely misconstrues the effect of testimony given before Congressional committees when Chapter X was being drafted and enacted. It would not be appropriate to burden this petition with all of the statements on the subject shown in the records of Congress. If permitted to brief this case fully, we will show that Congress knew, in enacting Chapter X, that it was denying priority to government non-tax claims. It will suffice to say here that the testimony quoted on page 8 of the opinion below (App. A 8), with respect to the priorities under Chapter X being those used in equity receiverships, does not have

reference to claims of the United States but obviously refers to claims other than those of the United States. Other evidence before Congress explains that United States claims are specifically dealt with in Chapter X and that priority is provided only for claims for taxes and customs duties. See the explanation of the language now in Sec. 199 of Chapter X when Congress first enacted it in 1935 as a part of Sec. 77-B of the Bankruptcy Act, as reported in the Congressional Record, Vol. 79, Part 13, 79th Congress. 1st Sess. (1935) page 14101.

2. THE HOLDING OF THE COURT OF APPEALS THAT THE PRIORITY STATUS OF CLAIMS UNDER CHAPTER X OF THE BANKRUPTCY ACT IS DETERMINED AS OF THE DATE WHEN A TRUSTEE IS APPOINTED IS CONTRARY TO THE PROVISIONS OF THE ACT AND IS CONTRARY TO THE DECISIONS OF THIS COURT AND IS CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEALS.

This proposition applies to the claims of the Maritime Administration and the Small Business Administration. They were not entitled to priority on June 27, 1957, when the reorganization proceedings began, as shown in the statement of facts above.

Chapter X is a part of the Bankruptcy Act and, except when otherwise expressly stated in Chapter X, all provisions governing conventional bankruptcy (Chapters I to VII, inclusive) are applicable (Sec. 102). It is settled that the date the petition is filed —not the date the pe-

tition is approved or the date the trustee is appointed—is the date as of which the rights of creditors and their relative priorities are determined.

Authorities for the above statement are *White v. Stump*, 266 U.S. 310, 69 L.Ed. 301 (1924); *U.S. v. Marxen*, 307 L.Ed. 200, 83 L.Ed. 1222 (1939); *Price v. Spokane*, 97 F.2d 237 (8th Cir. 1938); *State of New York v. Feinberg*, 202 F.2d 502 (2d Cir. 1938); *U.S. v. Edens*, 189 F.2d 876 (4th Cir. 1951), affirmed per curiam by this court, 342 U.S. 912, 96 L.Ed. 682.

The court below bases its opinion that priorities are fixed as of the date (November 18, 1957) when trustees were appointed upon the provision of Sec. 201 of Chapter X. This is a misconstruction of Sec. 201 which provides only for the *provability* of claims which *arise* during the interim between the filing of the initial petition instituting the reorganization proceedings and the appointment of a receiver or trustee.

Sec. 201 has nothing whatever to do with *priorities* of claims which *existed* at the time the proceedings began. We are concerned not with whether claims are *provable* but with whether, being provable, they are entitled to *priority*. Priorities of claims existing when the proceedings began are fixed as of such beginning date as shown clearly by the authorities cited above. While these authorities pertain to conventional bankruptcy rather than Chapter X, the rule is the same because of Sec. 1(13) of the Bankruptcy Act, which is applicable to Chapter X, and Sec. 200 in Chapter X.

3. THE HOLDING OF THE COURT OF APPEALS THAT THE CLAIMS OF THE MARITIME ADMINISTRATION AND THE SMALL BUSINESS ADMINISTRATION, WHICH WERE NOT ACQUIRED BY THOSE GOVERNMENTAL AGENCIES UNTIL **AFTER** THE PETITION FOR REORGANIZATION WAS FILED, ARE ENTITLED TO ABSOLUTE PRIORITY OVER OTHER UNSECURED CLAIMS IS CONTRARY TO THE PROVISIONS OF THE BANKRUPTCY ACT AND CONTRARY TO THE DECISIONS OF THIS COURT.

It has been pointed out in the facts outlined above that both of these claims were not assigned to the governmental agencies involved until *after* June 27, 1957, the date when the reorganization proceedings began. So the argument under point 2 above governs, and they must be denied priority.

With respect to the Carib Queen mortgage deficiency decree held by the Maritime Administration, this court has settled that a indebtedness insured by an agency of the government but not assigned to it until after a petition is filed, is not entitled to priority, even in conventional bankruptcy proceedings. *U.S. v. Marxen*, supra. The doctrine was applied and reaffirmed in *Small Business Administration v. McClellan*, 364 U.S. 446, 5 L.Ed. 2d 200 (1960).

As to the SBA loan, based upon a note given to the RFC, but not assigned to the SBA until three days after

these reorganization proceedings began, we have shown in the statement of facts that the statute governing the RFC expressly denies priority to a debt due the RFC, with certain exceptions not applicable here. The SBA under the law is merely the liquidating agent for the RFC, and it would seem to be elementary that a debt having no priority status in the hands of the RFC could not be endowed with priority by assignment thereof to another agenc yof the government, even if the assignment had been made before bankruptcy.

4. THIS CASE INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Reorganization proceedings under Chapter X of the Bankruptcy Act are increasing in both number and dollar amount involved as district courts become more experienced and efficient in administering them and attorneys and businessmen find them valuable as a means for rehabilitating financially ill concerns. Thousands of people become involved in even a small company such as TMT Trailer Ferry, Inc. which has some 300 creditors and several thousand stockholders.

The federal government seeks to take advantage of its laws to obtain a preference over its citizens with respect to debts arising out of the conduct of ordinary business transactions. This does not seem right, at least in the absence of a clear and unequivocal expression of Congressional intent so to do. This court quoted the following statment in *Davis v. Pullen*, 277 Fed. 650, 655 (1st Cir. 1922) with approval in *Mellon v. Michigan Trust Co.* 271 U.S. 236, 239, 70 L.Ed. 924, 926 (1926):

> "There is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents."

There does not appear to be a single court decision, other than the one below sought to be reviewed here, which passes squarely upon these important questions involving the priorities of United States non-tax claims in Chapter X reorganizations. And the court below divided 2 to 1, thus creating more doubt as to the correct answers.

The reversal of the trial judge by the Fifth Circuit Court in this split decision means the government will get about $550,000 *more* for its non-tax claims than it would if required to share on an equal basis with other unsecured creditors. This large amount is a direct loss to the creditors who are to take over the debtor upon reorganization, and is but one example in a single reorganization.

These important priority questions are squarely presented in this case and the need for clarification by this court is clearly indicated. The issues will surely arise in other cases where the fortunes of numerous other creditors and stockholders are involved.

CONCLUSION

For the foregoing reasons, we respectfully submit that the exercise of this court's powers are called for in order to correct the errors in the decision below, and petitioners therefore pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 20400

(Consolidated with Nos. 20563 and 20659)

UNITED STATES OF AMERICA,

Appellant,

versus

C. GORDON ANDERSON, TRUSTEE,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(June 8, 1964.)

Before RIVES, JONES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: This proceeding under Chapter X of the Bankruptcy Act, 11 U.S.C.A. §§ 501-676, for the reorganization of TMT Trailer Ferry, Inc., has been pending for more than six years, and has been before this Court on three prior occasions.[1] The United States

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1 TMT Trailer Ferry, Inc. v. Anderson, 5 Cir. 1961, 292 F.2d 455, cert. denied Shaffer v. Anderson, 368 U.S. 956 (1962); Caplan v. Anderson, 5 Cir. 1958, 259 F.2d 283; Caplan v. Anderson, 5 Cir. 1958, 256 F.2d 416.

is now appealing from an order which denies priority to its nontax claims.[2] The United States also appeals from subsequent orders of the district court amending, confirming and authorizing consummation of a plan of reorganization which fails to recognize the priority of the Government's nontax claims.[3]

The basic issue presented by the appeals is whether R.S. 3466, 31 U.S.C.A. 191,[4] is operative to give all debts

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2 The district court held that tax and customs claims totaling $192,101.68 should be paid in full, but that claims of the United States for other than taxes and customs duties are not entitled to any statutory priority and are to be ranked with claims of unsecured creditors. The nontax claims were listed in the district court's order as follows:

"1. Maritime Administration claim resulting from foreclosure and sale of the vessel T..IT Carib Queen, owned by the debtor, an nt of claim evidenced by foreclosure deficiency decr e in amount of	$696,494.19
"2. Small Business Administration claim resulting from foreclosure and sale of certain real and personal property owned by an affiliate of the debtor, the amount of claim being evidenced by a deficiency decree of	124,608.59
"3. Maritime Administration claim for charter hire and certain expenses owing under terms of a charter by the debtor of government owned tugs in amount of	56,647.08
"4. Department of the Navy claim for overpayments to the debtor by the military Sea Transport Service of certain freight charges in amount of	21,721.31
"5. Post Office Department claim for payments mistakenly made for messenger service not performed by the debtor in amount of	4,386.45
"6. Department of the Army claim for stevedoring services procured for government cargo handling when the debtor failed to provide the same as called for by charter of cargo space on the Carib Queen in amount of	776.62
"TOTAL NON TAX CLAIMS	$904,634.24".

3 The various appeals of the United States were consolidated by order of this Court.

4 "§191. *Priority established*

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of

due to the United States priority in this Chapter X corporate reorganization proceeding. The district court held that the only debts due the United States granted priority in Chapter X reorganization proceedings are those for taxes and customs duties, and that the controlling statute is section 199 of the Bankruptcy Act, 11 U.S.C.A. §599.[5] Two of the nontax claims[6] were held not entitled to priority in any event because, according to the district court, "at the time the petition herein was filed they were not owed to the United States."

Any priority allowed to claims of the United States must be founded upon statute. As was said by Mr.

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the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." 31 U.S.C.A. §191.

5 "§599. *United States as creditor*

"If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided*, That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed." 11 U.S.C.A. §599.

6 Those listed as 1 and 2 in footnote 2, supra.

Justice Story in the early case of *United States v. State Bank of North Carolina*, 1832, 31 U.S. (6 Pet.) 29, 35:

> "The right of priority of payment of debts due to the government, is a preogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign perogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal perogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms."

Mr. Justice Story then referred to the duty-collection act of August 4, 1790, ch. 62, sec. 45, to the Act of March 3, 1797, 1 Stat. 515, and to the Act of March 2, 1799, 1 Stat. 676. The pertinent provisions of the latter two Acts have remained substantially unchanged throughout nearly the entire history of our Nation, and are now embodied in R.S. 3466, quoted in footnote 4, *supra*. As was more fully developed in an even earlier case, that priority extends to debts of all kinds, equitable as well as legal,

and even to endorsements of a bill of exchange of which the Government is a holder. *United States v. Fisher*, 1805, 2 Cranch (6 U.S.) 358, 383-397.

Acts on the subject of bankruptcy were enacted in 1800 (2 Stat. 19), which Act was repealed in 1803; in 1841 (5 Stat. 614), which Act was repealed in 1843; and in 1867 (R.S. 5101), which Act was repealed in 1878.

The 1800 Act provided, in sec. 62 thereof, that:

> "Nothing contained in this law shall, in any manner, effect the right of preference to prior satisfaction of debts due the United States as secured or provided by any law heretofore passed."

The 1841 Act provided, in section 5 thereof, that all creditors should share in the bankrupt's estate pro rata, without preference or priority:

> "except only for debts due by such bankrupt to the United States."

The 1867 Act carried forward the priority in section 28 thereof by providing that:

> "the following claims shall be entitled to priority or preference, and to be paid in full, in the following order:
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> "'First. (Administrative expenses)
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> "'Second. All debts due to the United States and all taxes and assessments under the laws thereof.'"

While these Acts were in effect there was, therefore, no question but that nontax claims of the United States had priority in bankruptcy proceedings. From the time the 1867 Act was repealed in 1878 until the present Bankruptcy Act was enacted in 1898, we had no federal bankruptcy laws.

The Bankruptcy Act of 1898, as originally enacted, was construed by the Supreme Court to give priority only to "all taxes legally due to the United States," and not to afford priority for ordinary debts due to the United States. *Davis v. Pringle*, 1924, 268 U.S. 315, 317-319.

By the amendment of 1926 (44 Stat. at L. 662, chap. 406), Congress repealed the effect of that decision by adding the words now in section 64(a)(5) [11 U.S.C.A. §104] which specifically include the United States within the definition of the word "persons" to whom a priority status was given. So at the present time, by reason of the provisions of section 64(a)(5) as amended in 1926, all claims of the United States, whether tax or nontax, are given priority in conventional bankruptcy proceedings under Chapters I to VII of the Act, just as they were under the 1867 Act until it was repealed.

This Chapter X reorganization is, of course, not a conventional bankruptcy. Section 64 (11 U.S.C.A. 104) is expressly made inapplicable to Chapter X proceedings by section 102 of Chapter X (11 U.S.C.A. 502). Section 64 being thus excluded, the appellees argue that

Davis v. Pringle, supra, teaches that R.S. 3466 is not applicable to bankruptcy proceedings in the absence of a provision to that effect in the Bankruptcy Act, or otherwise stated, that we must look solely to the Bankruptcy Act for any priority status that must be recognized.[7] That is true, however, only when the terms of the Bankruptcy Act evidence an intention to cover all matters of priorities or when they are inconsistent with previous statutes such as R.S. 3466. *Davis v. Pringle, supra; Guaranty Title and Trust Co. v. Title Guaranty and S. Co.*, 1911, 224 U.S. 152, *United States v. Safer*, 1949, 336 U.S. 328, 340, n. 18.

Chapter X proceedings resemble equity receiverships more closely than they resemble conventional bankruptcy proceedings. As Mr. Justice Cardozo said in *Lowden v. Northwestern National Bank & Trust Co.*, 1936, 298 U.S. 160, 163:

> "A proceeding to reorganize is not a bankruptcy, even though an amendment to the bankruptcy act creates and regulates the remedy."

The legislative history of Chapter X indicates the reasons for not adopting the strict priority provisions of section 64, and that the priorities used in equity receiverships would be preferable. Mr. Gerdes, one of the draftsmen of Chapter X, testified in the hearings before the Senate Judiciary Committee on H.R. 8046, 75th Cong., 2d sess. 1937, 1938, p. 79:

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7 The basis for the district court's denial of priority to the non-tax claims of the United States was the court's opinion "that [31 U.S.C. §§ 191-192], passed before the bankruptcy acts, are not controlling and that the priority status of all claims must be determined by considering only the provisions within the bankruptcy acts."

"Section 64 of the general bankruptcy act, for example, provides for a fixed priority in the payment of claims. This section deals solely with unsecured claims, only unsecured claims being affected by bankruptcy. To apply it in corporate reorganizations—where secured as well as unsecured claims are dealt with—would cause great confusion. To make it clear that Section 64 does not apply, we propose this amendment which expressly provides that 64 shall not be applicable to chapter X. *The priorities under chapter X would therefore be those used in equity receiverships.* That is the present practice under 77B, which expressly provides that section 64 shall not be applicable. When we adopt the same provision here we merely adopt the practice which is already in existence under section 77B." (Emphasis supplied.)

Section 115 of Chapter X, 11 U.S.C.A. §515,[1] confers on the reorganization court all the powers which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature. It thus clearly appears that

[1] "§515. *Same; jurisdiction as in insolvency*
"Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature." 11U.S.C.A.

the terms of Chapter X were not intended to cover all matters of priorities.[9]

Nor do we think that section 199 (quoted *supra* in n. 5) is inconsistent with R.S. 3466. Section 199 is applicable in the reorganization of solvent as well as insolvent corporations. It requires the consent of the Secretary of the Treasury to the confirmation of any plan of reorganization which does not provide for the payment of claims of the United States for taxes. This provision first appeared in the Act of August 29, 1935, 49 Stat. 965, 966, which amended former section 77B of the Bankruptcy Act to give a first priority to tax claims of the United States. Its legislative history shows that its purpose was to insure full payment of taxes and customs claims in every reorganization proceeding, including those involving solvent corporations where R.S. 3466 would not apply. See Senate Report No. 1386, 74 Cong., 1st sess.

In addition to section 199, the appellees refer to other provisions of Chapter X which they contend are inconsistent with R.S. 3466.[10] Those provisions make no

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9 Indeed, the plan of reorganization approved and confirmed by the district court in this very proceeding gave priority to and provided for payment in full of state and local tax claims despite the fact that there is no provision in Chapter X which gives priority to the claims of state and local governments. See 6 Collier, Bankruptcy, 14th ed., para. 9.13(3), pp. 2849, 2850.

10 As expressed on pages 24 and 25 appellees' brief:

"Sec. 107. (Definitions) 'Creditor shall mean the holder of any claim.' (No exception as to the United States. It is therefore a creditor for purposes of Chapter 10).

"Sec. 216. 'A plan of reorganization under this chapter (1) shall include in respect to creditors generally or some class of them, secured or unsecured * * * provisions *altering or modifying their rights*.' (No exception here as to claims of the United States.)

reference to the United States. The proposition is established, "that the United States as a sovereign is not bound by the general language of a statute, and is not bound by the provisions of an insolvency law, unless specifically mentioned therein." *Guarantee Co. v. Title Guaranty Co.*, 1912, 224 U.S. 152, 155.

As has been noted, it was said as early as 1832 that R.S. 3466 should be given a liberal construction. *United States v. State Bank of North Carolina, supra*, 31 U.S. (6 Pet.) at 35. In more recent years the Supreme Court has repeatedly said that "There exists now the same reasons for a liberal construction of the priority act as when the rule was laid down." *Brownell v. United States Fidelity Co.*, 1926, 269 U.S. 483, 487, followed in *United States v. Emory*, 1941, 314 U.S. 423, 426, 428-430. Repeatedly also the Supreme Court has announced the principle that, "Only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of section 3466." *United States v. Emory, supra*, 314 U.S. at 433, followed in *United States v. Remund*, 1947, 330 U.S. 539, 545. We find no such inconsistency between the purpose and provisions of Chapter X of the Bankruptcy Act and section 3466.[11]

"Sec. 216(7). This provides that if a plan is not accepted by any class of creditors (no exception made as to claims of the United States), the plan must provide for the realization by the creditors of the actual value of their claims by one of several specified methods. This is not a priority provision and gives no priority."

11 The gist of our holding thus far is stated more clearly and succinctly in footnote 13, 6 Collier on Bankruptcy, 14th ed., para. 9.13, pp. 2845, 2846.

The district court further held that the first two claims listed in footnote 2, *supra*, that is *Maritime Administration* $696,494.19 and *Small Business Administration* $124,608.59, are not entitled to priority in any event because at the time the involuntary petition was filed they were not owed to the United States.[12]

The involuntary petition was filed on June 27, 1957. TMT first moved to dismiss that petition, and when the district court refused to dismiss, TMT denied insolvency or commission of an act of bankruptcy. It was not until November 15, 1957, that TMT filed a petition consenting to reorganization, confessing insolvency and praying for the appointment of trustees. Up to that date no receiver had been sought or appointed and TMT had continued business as usual. On November 18, 1957 the district court approved a petition for reorganization and appointed trustees.

At sometime prior to November 15, 1957, the United States had unquestionably become the owner of both claims.[13] The Government insists that as early as the date of the filing of the involuntary petition, the claims of the Maritime Administration and the Small Business Administration were provable priority claims. We find

12 The district court relied on United States v. Marxen, 1939, 307 U.S. 200; Small Business Administration v. McClellan, 1960, 364 U.S. 446; 6 Collier on Bankruptcy, 14th ed., p. 2834 and pp. 246-247; In re Temple, 2 Cir., 1949, 174 F.2d 145; and 15 U.S.C.A. 603(a) pocket supp.

13 The promissory note involved in the Small Business Administration Claim was transferred pursuant to Reorganization Plan No. 1 of 1957, 3 CFR, 1954-1958 Comp., pp. 445-447, which was effective June 30, 1957. The bond and mortgage involved in the Maritime Administration claim were transferred to the United States on October 31, 1957.

it unnecessary to pass upon that insistence, because if the two claims were not then provable priority claims of the United States they became such after the filing of the involuntary petition and before the appointment of the trustees, and thus come clearly within the terms of section 201 of the Bankruptcy Act, 52 Stat. 840, 893, 11 U.S.C.A. §601.

> "§601. *Provability of claims arising after petition*
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> "All claims arising after the filing of a petition under this chapter and before the qualification of a receiver or trustee or before the petition is approved and the debtor continued in possession, whichever first occurs, shall be provable."

As said in 6 Collier on Bankruptcy, 14th ed., para. 9.11, p. 2836, "This provision (referring to sec. 201) places the claims encompassed thereby on the same footing for purposes of classification as claims arising prior to the filing of the petition."[14]

We hold, therefore, that all of the claims of the United States listed in footnote 2, *supra*, are entitled to the priority provided by R.S. 3466. That holding necessitates a reversal of each of the orders from which the several appeals are prosecuted, and it is not necessary to rule upon the Government's further insistence that after its appeal from the order denying

[14] See also 6 Collier, 14th ed., para. 9.19, pp. 2871, 2; 2 Gerdes, Corporate Reorganization (1936) sec. 614; Gerdes, Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act, 52 How.L.Rev. 1, 28.

priority to its nontax claims was pending before this Court, the district court had no jurisdiction to enter orders amending, confirming and authorizing consummation of a reorganization plan which denied priority to the nontax claims. The orders in Nos. 20400, 20563 and 20659 are reversed and the causes remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

JONES, Circuit Judge, dissenting:

I find myself in accord with the district court's conclusion that the Chapter X provision relating to priorities to the United States is controlling in Chapter X proceedings. The majority of this Court, in rejecting this view, makes out a pretty strong case in support of it. The priority provisions of conventional bankruptcy and the equity receivership priorities are not applicable. What rule then applies? The majority applies the general statute rather than the Chapter X provision. I think they mistake the purposes of the Act.

To me it seems not at all unreasonable that in the reorganization of a business enterprise all claims of the same class should be treated alike; and when the United States enters a non-governmental field and makes business loans, it might expect to be treated as others who engage in similar transactions. I think Congress so intended and would construe the statute to give effect to such intent. Therefore I

DISSENT.

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1963

No. 20400

(Consolidated with Nos. 20563 and 20659)

D. C. Docket No. 3659-M-Bk

UNITED STATES OF AMERICA,

Appellant,

versus

C. GORDON ANDERSON, Trustee,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before RIVES, JONES and WISDOM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court that the orders of the said District Court appealed from in these consolidated causes be, and the same are hereby, reversed; and that these causes be, and they are hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

"Jones, Circuit Judge, Dissents"

June 8, 1964

Issued as Mandate:

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN BANKRUPTCY — NO. 3659-M

In the Matter of:

TMT TRAILER FERRY INC. et al,

Debtors.

ORDER DENYING PRIORITY STATUS TO CERTAIN GOVERNMENT CLAIMS
and
DETERMINING THAT AN IMMEDIATE APPEAL IS DESIRABLE

This cause came on for hearing on the petition of the trustee herein for an order denying priority to those claims of the United States which are other than for taxes or customs duties, and on similar petitions filed by the committee appointed to represent unsecured creditors and by counsel for other secured and unsecured creditors. These petitions were opposed by the government and have been heard after notice to parties in interest and the issues submitted by briefs filed with the court.

The claims involved have been grouped as Class 2 under the approved plans of reorganization, are commonly

referred to as the non-tax claims of the United States, and according to the record herein consist of the following:

1. Maritime Administration claim resulting from foreclosure and sale of the vessel TMT CARIB QUEEN, owned by the debtor, amount of claim evidenced by foreclosure deficiency decree in amount of $696,494.19

2. Small Business Administration claim resulting from foreclosure and sale of certain real and personal property owned by an affiliate of the debtor, the amount of claim being evidenced by a deficiency decree of 124,608.59

3. Maritime Administration claim for charter hire and certain expenses owing under terms of a charter by the debtor of government owned tugs in amount of 56,647.08

4. Department of the Navy claim for overpayments to the debtor by the military Sea Transport Service of certain freight charges in amount of 21,721.31

5. Post Office Department claim for payments mistakenly made for messenger service not performed by the debtor in amount of 4,386.45

6. Department of the Army claim for stevedoring services procured for government cargo handling when the debtor failed to provide the same as called for by charter of cargo space on the Carib Queen in amount of	776.62
TOTAL NON TAX CLAIMS	$904,634.24

The basis for and exact amount of these claims has never been finally adjudicated in these proceedings, but the trustee has represented to the court that the basis for these claims and the principal sums claimed are as stated above and are considered to be proper claims by the trustee. The government has not questioned the amounts nor the basis for the claims, and for the purposes of this order it is assumed that they are accurate and valid.

There is no problem with respect to the tax and customs claims of the United States. These are grouped as Class 1 in both of the approved plans of reorganization and are shown as totaling $192,101.68 in the approved summaries of the two plans.[a] Both plans of reorganization provide for the payment in full of these claims as did a former plan of reorganization, approved and confirmed in 1959 but later set aside.[b]

The government non-tax claims, however, have been throughout these procedings the subject of negotiations and proposed settlement as to the amount to be allowed upon reorganization of the debtor, the court having found

(a) Exhibits "A" and "B" to the order entered herein under date of July 9, 1962, entitled OPINION AND ORDER APPROVING PLANS OF REORGANIZATION.

(b) See *TMT v Anderson*, 292 F 2d 455 (1961-C.C.A 5th).

the debtor to be insolvent.[c] A settlement approved by this court on November 4, 1959, in confirming the former plan provided for the government to receive for its non-tax claims, then totaling $908,831.14, the sum of $25,000 to be paid over a period of 24 months and in addition 27½% of the total claim in preferred stock of the reorganized debtor on the basis of one share for each $1.00 of such 27½%. The unsecured creditors under that plan would have received 17½% of their claims in the preferred stock. Had this former plan been consummated, the government's non-tax claims would have received somewhat more favorable treatment than those of unsecured creditors but far less than their full amount.

The trustee was authorized informally by the court to negotiate with the representatives of the government for a settlement of the non-tax claims in connection with his work on the recently approved plans. No agreement was reached and the trustee submitted his Internal Plan of Reorganization providing that the United States be paid its tax claims in full and that the non-tax claims be paid 40% of their total or about $363,000. At the same time, the court received a cash offer of $2,515,000 for the assets of the debtor and a second plan of reorganization was submitted which also provided for settlement of the non-tax claims at 40%. Both of these plans were approved by the order of July 9, 1962, and sent out for acceptance by the creditors.

The results of the balloting were overwhelmingly in favor of the Internal Plan as shown by the trustee's report thereof filed on August 6, 1962. The unsecured creditors

(c) Orders of Insolvency have been entered on Feb. 25, 1959, and July 9, 1962.

voted 79.6% in favor of the Internal Plan and the principal class of secured creditors voted 70.9% in favor of that plan. The only creditors who did not approve the Internal Plan were retain title contract holders of claims in Class 7 totaling $9,511.49, whose claims are too small in amount to prevent reorganization, and the United States which expressly rejected both plans for the reason that neither provided fair nor equitable treatment of the non-tax claims which, it was stated, should have been afforded full satisfaction as priority claims before permitting junior classes of creditors to participate. At the same time, counsel for the government offered, without prejudice to the claim of full priority, to accept $635,000 in cash in adjustment of the non-tax claims upon confirmation of a plan of reorganization. This amounts to about 70% of the total of these claims.

The trustee refused to accept this offer. It would not be feasible to pay the government $635,000 under the Internal Plan which the other creditors had accepted because the debtor does not have sufficient cash to make such payment together with the other cash requirements of the plan and operating committments of the business.

The trustee then filed the petition which is the subject of this order requesting the court to determine that the government's non-tax claims are not entitled to priority. The history and background of the issue have been outlined not only because the issue is a vital one affecting the intended reorganization of the debtor but also because counsel for the government have urged that the trustee has not filed his petition in good faith, that the claims involved have throughout the proceedings been treated as entitled to priority, that this court expressly found in

its order of July 9, 1962, approving the plans of reorganization that the claims were entitled to a statutory preference, and that the trustee and the other creditors may not now properly challenge the government's priority status.

It is the opinion of the court that the trustee and creditors are not estopped to raise this issue, that while there has been continuous recognition of the government's claim to priority no issue has heretofore been presented concerning the validity of the claimed priority and no specific priority determination has been made by the court. The statements contained in the order approving the reorganization plans which appear to recognize some statutory preference for these claims were not made as a result of any pending issues on the subject. Furthermore, that order is purely interlocutory and the provisions in it regarding the non-tax claims pertain only to the proposed settlement contained in the plans. This court is required in proceedings of this kind to make whatever decisions are correct and may rescind or supercede prior orders before any rights have become final by consumation of a reorganization plan. TMT Trailer Ferry, Inc. v. Anderson, 292 F. 2d 455 (1961-CCA 5th). The priority issue is therefore properly before the court at this time.

The first question is whether all of the non-tax claims are entitled to priority, as claimed by the government, under the provisions of R.S. Sec. 3466 (31 USCA 191) enacted in 1797 which gives priority to all debts due the United States in cases of insolvency and under R.S. Sec. 3467 (31 USCA 192) which places liability on a fiduciary who distributes assets without first paying debts due the United States. It is the opinion of the court that these

statutes, passed before the bankruptcy acts, are not controlling and that the priority status of all claims must be determined by considering only the provisions within the bankruptcy acts.

The only priority provision in reorganization proceedings under Chapter X of the Bankruptcy Act is found in Section 199 which covers the entire field of United States claims, and this section grants priority only to "claims for taxes or customs duties." Had it been the intention of Congress to afford priority to any other claims, specific language to that effect would have been included, especially since the section makes reference to interests of the government other than for taxes or customs including reference to claims as an "unsecured creditor." The legislative history of the Chandler Act shows that non-tax claims of the United States were to be treated the same as those of other creditors. It appears from the House Report on the bill (House Report No. 1409 on H.R. 8046, 75th Congress, 1st Sess. (1937) 55-56, that Section 199 was intended

> "To strike a balance between the necessity of safeguarding the Government's tax interests in a debtor corporation, or the new corporation resulting from the reorganization, and the necessity of scaling down the inde[illegible]'ness of the debtor corporation in order to [illegible]e the plan successful."

The conclusion is strengthened by the decisions in *Davis v. Pringle*, 268 U.S. 315, 69 L.Ed 974 affirming *Davis v. Pringle*, 1 F.2d 860 (CCA 4th) wherein the question was squarely presented whether R.S. 3466 was ap-

plicable to bankruptcy proceedings in the absence of any provision to that effect in the then bankruptcy act, and the question was answered in the negative. The Pringle holding was re-affirmed in *Bramsell v. U.S.F. & G.* 269 U.S. 483, 70 L.Ed 368.

The trustee and the creditors also contend that the first two claims listed above are not entitled to priority in any event because at the time the petition herein was filed they were not owed to the United States. The Carib Queen deficiency claim of $696,494.19 was an obligation to The Prudential Insurance Company of America when the involuntary petition was filed herein on June 27, 1957, the Maritime Administration being a guarantor of the debt at the time. The proof of claim filed shows that the obligation was not assigned to the United States until October 31, 1957, under a mortgage insurance agreement. The rule is that for the purposes of classification the nature of a claim is determined as of the date when the reorganization petition was filed. *6 Collier (14th Ed.)* page 2834 and pages 246-247.

The Supreme Court has decided that an indebtedness insured by an agency of the government but not assigned to the government until after the petition is filed is not entitled to priority even in conventional bankruptcy proceedings. *U.S. vs. Marxen*, 307 US 200, 83 L.Ed. 1222. *Small Business Administration v. McClellan*, 364 US 446, 5 L.Ed. 2d 200.

The second claim listed above, that of the Small Business Administration for $124,608.59 is likewise not entitled to priority for the same reason. The proof of claim shows that it was evidenced by the promissory note of the debtor

in amount of $200,000 in favor of the Reconstruction Finance Corporation in consideration of an obligation of Tomdock, Inc., an affiliate of the debtor, to pay for certain property sold by the RFC to Tomdock. The assignment of the debt to the Small Business Administration did not become effective until June 30, 1957, or three days after the reorganization petition was filed. The obligation while owing to the RFC was not entitled to priority by the express terms of the RFC Act, 15 USCA 603 (a) Pocket Supp, and it was assigned to SBA as the agent of RFC for the liquidation of RFC claims. The case of *In Re Temple* 174 F.2d 145 (CCA 2d) quotes from the legislative history of the RFC Act a statement showing that Congress did not intend for RFC to have priority in bankruptcy with respect to debts arising from its normal lending activities.

It is the further opinion of the court that since the government's non-tax claims are not entitled to any statutory priority, they must be treated on the same basis and priority as are other unsecured creditors in Class 8 under the plans of reorganization. The Internal Plan accepted by the other creditors provides that all the common stock of the reorganized debtor be issued to the unsecured creditors in exchange for their claims. The rejection of the plan by the government makes it necessary for the value of the non-tax claims to be determined, and dealt with in the order confirming the plan by one of the methods provided in Section 216 (7) of the Bankruptcy Act.

The trustee has urged that the court confirm The Internal Plan, and appraise the value of the non-tax claims and pay the amount determined in cash to the govern-

ment. It appears that this would be feasible but the court it unwilling at this time to confirm the Internal Plan since there is pending an appeal by the Stockholders Committee from the Order of Insolvency and since counsel for the government have indicated that an appeal will be taken from any order denying priority to the non-tax claims. These questions involving the stockholders' rights and the government's priority should be resolved by the Court of Appeals as promptly as possible in order that a plan of reorganization can be confirmed at an early date and the profitable business developed under the trusteeship returned to private management.

The court therefore finds that the provisions of Title 28 USCA Section 1292 (b) apply to this order, that this order involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation and of the reorganization proceedings. If an appeal from this order is taken promptly this court will hold in abeyance the matter of confirming the Internal Plan of Reorganization, otherwise it may proceed to confirm that plan.

Wherefore, in view of the foregoing findings and opinion, it is

ORDERED, ADJUDGED and DECREED that

1. The petition of the trustee and of others for the confirmation of the Internal Plan of Reorganization at this time is DENIED provided an appeal is taken promptly from this order.

2. The claims of the United States for other than taxes and customs duties are not entitled to any statutory priority and are to be considered as having the same priority as those of other unsecured creditors.

3. This order involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation and of these reorganization proceedings.

DONE and ORDERED at Miami, Dade County, Florida, this 28th day of September, 1962.

s/ EMETT C. CHOATE

United States District Judge

PROOF OF SERVICE

I, HARRY N. BOUREAU, one of the attorneys for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, certify that on the 13th day of July, 1964, I served copies of the foregoing Petition for Writ of Certiorari on the respondent, UNITED STATES OF AMERICA, by mailing a copy in accordance with Rule 33 of the United States Supreme Court Rules to the following counsel of record for the respondent herein at the addresses shown:—

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